Neutral Citation Number: [2021] EWCA Crim 1526

Case No: 202002834 A2

**IN THE COURT OF APPEAL (CRIMINAL DIVISION)**
**ON APPEAL FROM ISLEWORTH CROWN COURT**
**His Honour Judge Johnson**
**T20200086**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 October 2021

**Before :**

**LORD JUSTICE DINGEMANS**
**MR JUSTICE NICKLIN**
and
**MRS JUSTICE COCKERILL**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

| | |
|---|---|
| **Leon Khan** | **Applicant/ Appellant** |
| **- and -** | |
| **Regina** | **Respondent** |

- - - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - - -

**The Appellant appeared in person**
**Sheilagh Davies** (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing date: 29 September 2021

- - - - - - - - - - - - - - - - - - - - -

# Approved Judgment

**Mr Justice Nicklin :**

1. The Applicant appeared at Isleworth Crown Court on 18 September 2020. He had previously been charged with a single count of sending an electronic communication with intent to cause distress or anxiety contrary to s.1(1)(a) Malicious Communications Act 1988. A summary offence of harassment, without violence, had also been sent to the Crown Court. Although, ultimately, the Crown offered no evidence against the Applicant on these charges, and he was formally acquitted, the Court nevertheless imposed a restraining order upon the Applicant, pursuant to s.5A Protection from Harassment Act 1997, prohibiting him from contacting the complainant for a period of 10 years. The Applicant seeks to appeal against the imposition of the restraining order. His application was referred to the Full Court by the Single Judge.

**The Prosecution case**

2. The Crown's case was that the Applicant bombarded the complainant with abusive messages and telephone calls after the breakdown of their 6-week relationship. Specifically, on 8 July 2019, it was alleged the Applicant had telephoned the complainant, threatened to kill her and to throw acid in her face. The Applicant was arrested on 18 October 2019 and released on police bail. It was further alleged that whilst on bail he continued to harass the complainant by sending her emails and making unwanted telephone calls. He was charged on 22 January 2020 and appeared, in custody, before Westminster Magistrates' Court on 23 January 2020.

**Proceedings in the Crown Court**

3. The Applicant indicated not guilty pleas and the case was sent to Isleworth Crown Court. The Applicant was remanded in custody. At the Plea and Trial Preparation Hearing, on 18 February 2020, the Applicant indicated not guilty pleas but was not arraigned as the Judge raised concerns about his mental health. A provisional trial date was fixed for 29 June 2020.

4. On 5 May 2020, the matter was listed for an application to dismiss. At that hearing, defence counsel withdrew on the grounds of professional embarrassment. The application to dismiss was adjourned to 26 May 2020. At that hearing, the application to dismiss was refused and the Applicant was arraigned. Pleas of not guilty were entered on his behalf by the judge. By this point, it had become clear that the impact of the COVID pandemic meant that the provisional trial date was unachievable. On 29 June 2020, the custody time limit was extended, and the trial fixed for 18 September 2020.

5. The Applicant made several unsuccessful bail applications. He also sought a writ of habeas corpus. That application was refused on the papers but reconsidered at an oral hearing. Spencer J dismissed the application ([2020] EWHC 2124 (Admin)), finding that the Applicant had been lawfully remanded in custody by a court pending his trial. The Judge nevertheless noted that the Applicant had been in custody for over six months, for an offence that carried a maximum sentence of 2 years' imprisonment, and that it was "*unfortunate*" that it appeared likely that a further extension of the custody time limits would be required. Moreover, he indicated that the judgment should be provided to the Applicant, his solicitors, the Crown Prosecution Service and the Crown Court so as to "*facilitate the understanding of the Resident Judge … and any*

*Judge dealing with the matter, and ensure that the case can be disposed of, if appropriate, with necessary urgency within, … a matter of days of the decision being taken by the Crown if that is indeed the decision, not to proceed further with the charge on indictment*".

6. Following the judgment of Spencer J, the Crown Prosecution Service informed the Applicant, and the Court, that it intended to offer no evidence against the Applicant at the hearing on 18 September 2020, but would apply for a restraining order on acquittal, pursuant to s.5A Protection from Harassment Act 1997. The Applicant was granted bail and the Crown's application for a restraining order under s.5A was fixed for hearing on 18 September 2020.

## Restraining Order Hearing

7. The hearing on 18 September 2020 was listed at 10am. A full transcript of the proceedings has been obtained. At 09.56, the Applicant emailed the court to advise that his train was slightly delayed. Shortly after, he also telephoned the court office but did not provide an estimated time of arrival. When the case was called on at 10am, the Applicant was not present. The Judge observed: "*I am slightly surprised that he is not here. He is normally fairly keen to have his say.*" The clerk of the Court informed the Judge that an email had been received from the Applicant stating that he had been delayed. The Judge adjourned the hearing, sitting again shortly before 11am. The Applicant had still not arrived, and no further indication had been received as to his likely arrival time.

8. The Prosecution initially sought a warrant for the Applicant's failure to surrender to bail. However, the Judge invited representations as to whether he should proceed in the Applicant's absence. The prosecuting advocate agreed that there was "*no reason why [the court] should not proceed [in his absence] because he knows very well of today's hearing*". The Judge referred to ***R -v- Jones*** **[2003] 1 AC 1** and identified that, in deciding whether to proceed in the Applicant's absence, he had to have regard to (1) the circumstances of the Applicant's behaviour in absenting himself, in particular whether the behaviour was voluntary, (2) whether an adjournment would resolve the matter, (3) the length of any adjournment, (4) whether the Applicant wished to be represented, (5) the extent of any disadvantage of the defendant not being able to present his account of events, and (6) the risk of the court reaching an improper conclusion. There was a general public interest in the matter being resolved in a reasonable time.

9. Without hearing any further submissions from the Crown, the Judge concluded that the Applicant was aware that the Prosecution intended to apply for a restraining order and that 70 minutes was not a "*slight delay*". He therefore concluded that the Applicant had waived his right to be heard and the matter should proceed in his absence. He added that "*if he turns up during the hearing, we will deal with it, as and when*".

10. The Prosecution called a police officer, PC Bilham, to give evidence in support of its application. She stated that, on 8 July 2019, she had attended the complainant's home. The complainant told PC Bilham that she had been in a relationship with the Applicant for approximately 6 weeks. It had broken down and they had separated. She stated that, on that day, the Applicant telephoned her approximately 200 times. During one of those calls, the complainant alleged that he had threatened to throw acid in her face and threatened to kill her. During the meeting with PC Bilham, the complainant's mobile

telephone rang repeatedly. Although PC Bilham advised her against answering the calls, the complainant answered some calls and put the call on speaker. An audio-recording of one call was played to the court. The call came from an unknown number. PC Bilham stated that it appeared that the caller, "*kept going on about a song he had written about her*". She said that over the course of approximately 15 minutes, the complainant had been telephoned approximately 20 times, although not all calls were answered by her.

11. The Prosecution also called the Officer in the Case, DC Bovakova. She stated that on 23 November 2019, the Applicant attended Charing Cross police station and made allegations against the complainant. She described the Applicant as aggressive and uncooperative.

12. At this point in the proceedings, the clerk of the court informed the Judge that she had received a message that the Applicant had telephoned again and stated that he had arrived at Twickenham station and estimated that he would arrive at approximately 12.15. The Judge stated: "*we will carry on without him*" and returned to hearing DC Bovakova's evidence, who summarised the Applicant's interviews. When questioned, the Applicant had denied the allegations and claimed the complainant threatened him and his mother. In respect of the allegations of harassment in October and November 2019, he accepted making some calls, but not all of them. When he was presented with emails purportedly sent to the complainant, he accepted that they had been sent from his email address, but claimed his account had been accessed without his authority. DC Bovakova exhibited and read some of the emails received by the complainant. She also confirmed that the Applicant's allegations against the complainant had been investigated, but the abusive messages could not be traced to the complainant's accounts. She had been interviewed and denied making the threats. Finally, DC Bovakova confirmed that the email address that had been used to send messages to the complainant was the same address that the Applicant had used to send DC Bovakova emails.

13. At the conclusion of the Prosecution's evidence, the Judge sought an explanation for the complainant's absence. The prosecuting advocate stated that the complainant had said that "*she had so many calls that her state of mind is such that she did not feel able to come to court, that she stood by the allegations she had made in her various statements and would be content to leave the matter in the hands of the [CPS] if a restraining order was put in place, but she was invited to come to court and declined*". DC Bovakova confirmed this account whilst under oath, and stated that the complainant preferred not to give evidence but did want a restraining order. She had refused to come to court because she was anxious. In light of that evidence, the Judge concluded that the complainant's evidence was not admissible, but the evidence of the officers and the exhibits were admissible.

14. The Judge gave a short ruling on the application for a restraining order. Based on the evidence of the two officers, he was satisfied to the civil standard that there had been persistent harassment of the complainant. He accepted that the officer who attended the complainant's home had witnessed a call from an agitated Applicant and witnessed further calls coming "*thick and fast*". He considered it was regrettable that more calls had not been recorded, but accepted that the officer in the case had provided compelling evidence that the Applicant had sent the emails. There was no evidence to support the assertion that the Applicant's account had been "*hacked*". Initially, the Judge indicated

that he would impose a restraining order for an indefinite period, but following representations by the prosecuting advocate inviting him to impose any order for 5 years, he imposed a restraining order for 10 years. The restraining order prevented the Applicant from contacting the complainant or from going within 50 yards of her home address or any business address at which the complainant was employed.

15. Clearly anticipating that the Applicant would arrive shortly, the Judge asked the prosecuting advocate, and witnesses to wait until 12.30, at which point they could be released. The Crown then offered no evidence on the charges of harassment and under the Malicious Communications Act, and the Applicant was formally acquitted of the charges he had faced.

16. At 12.23, the Court reconvened, the Applicant having arrived shortly before then. The Judge told him that he had heard the prosecution's evidence in his absence. The Applicant informed the Court that he had been delayed in part by travel issues and in part by the complainant's "*gang members*" delaying his journey. He told the Judge that he left home at approximately 09.30 and had travelled by train. His journey was partly delayed because he had taken the wrong train. He stated that "*gangsters*" had been outside his mother's home, and he had not slept the night before. Some of these comments should perhaps have indicated to the Judge that there were potential mental health issues that may have had an impact on the Applicant's delayed arrival at Court. The prosecuting advocate submitted that the Court had allowed the Applicant "*as much leeway as was appropriate*" before the Court had decided, at 11.10, to proceed in his absence.

17. The Judge concluded that the Applicant was aware of the time of the hearing and that he only had a short distance to travel to the Court from his address in Holland Park. He noted that the Applicant provided an email to the court 4 minutes before the hearing was due to start and he had sent no further update for a significant period, resulting in him attending almost 2½ hours late. For those reasons, the Judge did not accept the Applicant's explanation for his delay.

18. Clearly frustrated, the Applicant asked, "*What kind of madness is this?*" and began to provide further information to the Judge about "*people threatening to petrol bomb*" his mother's house. He protested to the Judge, "*You have not even listened to my excuse. This is madness*". The Judge responded, "*I assume Mr Khan wishes me to reopen this case*". The transcript records Mr Khan directing his next comment, not to the Judge, but to the prosecution, "*You want a restraining order; you wanted a restraining order that bad. Is it worth it?*". The Judge then stated that he refused to reopen the case and, "*accordingly, the restraining order stands*". The Applicant responded: "*The lady told me on the phone the judge is going to hear the case when I get here, and I have got until quarter past 12. What is going on?*". The hearing then was brought to a close with the Applicant continuing to protest.

## Grounds of Appeal

19. In his original grounds of appeal, the Applicant has submitted:

    i) he had arrived at court, late, to discover that the Judge had proceeded in his absence and already imposed the restraining order; and

ii) he was not afforded an opportunity to re-open the case and challenge the imposition of the restraining order.

20. Further, in an email dated 4 June 2021 to the Registrar, he additionally contended that the Judge had failed to follow the proper procedure, as set out in ***R -v- Baldwin*** **[2021] EWCA Crim 703**.

## Respondent's Notice

21. The Prosecution has lodged a Respondent's Notice and Grounds of Opposition in which it submitted:

i) The Judge had afforded the Applicant the opportunity to make representations. He made repeated attempts to discover the Applicant's reasons for opposing the imposition of the restraining order. The Applicant was unable to provide any substantive objections against the imposition of the order or any evidence to support the allegations that he had made against the complainant.

ii) The Judge had given the Applicant the opportunity to make representations on the reopening of proceedings. However, the Applicant's responses did not persuade him to reopen the case.

iii) The Applicant did not provide a good reason for arriving late. The account he provided to the court was not coherent. He was aware of the date and time of the hearing, made only one contact with the court at 09.56 and provided an account that the Judge found was not consistent with the length that the journey should have taken.

22. The Single Judge referred the Application for permission to appeal to the Full Court on the grounds that it appeared arguable that the Judge's very brief judgment did not adequately explain the factual basis for the order which he imposed, or his reasons for doing so: see ***R -v- Major*** **[2010] EWCA Crim 3016** [17]-[20]. It was arguable that the Judge had not identified the particular evidence he considered justified the restraining order he had imposed. The Single Judge also considered that it was arguable that the Judge should not have proceeded in the Applicant's absence, given that he received information that he was on the way to court.

## Appeal hearing

23. The Single Judge granted a representation order and although he has been encouraged to obtain legal representation, the Applicant has decided to conduct his application himself. He did so via video link from prison where he was being held on remand for another matter. The Applicant's submission ranged somewhat beyond the issues raised in his grounds of appeal, but the main thrust of his complaint was that the Court should not have proceeded in his absence.

24. Ms Davies submitted that the Judge had been entitled to proceed in the Applicant's absence. The Judge had previously dealt with earlier hearings in the case. The delay was not insignificant, and the Applicant had been fully aware of the hearing and its importance. The Judge was entitled to reject the explanation for the delay offered by the Applicant.

## Decision

25. We have some sympathy for the Judge, who had dealt with previous hearings with the Applicant. However, we have reached the conclusion that the hearing on 18 September 2020 was procedurally unfair. The decision whether to proceed in a defendant's absence must be taken cautiously. The Judge correctly identified the authority of ***Jones***, but he did not invite the prosecution's submissions, or apparently assess the relevant factors before deciding to proceed in the defendant's absence. Frustrating though the delay was, the Applicant had communicated to the Court that he was on his way. The Court was about to hear evidence in support of the application for the restraining order. The Defendant was not represented. Proceeding in his absence meant, first, that he would not hear the prosecution's evidence; second, he would be unable to cross-examine the prosecution witnesses; third, he would not have the opportunity to present any evidence (including giving evidence himself) in his defence; and fourth, he would not be able to make submissions to the Judge as to whether a restraining order was necessary, and, if so, in what terms and for what period.

26. As was clear from his police interview, the key points of the Applicant's defence were (a) he denied making all the relevant telephone calls; and (b) he claimed that his email address had been accessed without his consent. As such, there was a substantial disadvantage to the defendant in proceeding in his absence. As became clear during the hearing of the appeal, the Applicant's case was not that his email account had been "hacked", as that term is conventionally understood, but that the complainant had accessed his email account by using his password without his permission. Although there was no clear indication of when the defendant was likely to arrive, the likely adjournment was going to be a matter of hours not days.

27. Whilst, ultimately, it will be for the judge to weigh the relevant factors identified in ***Jones*** and, if fairly performed, an appeal court is unlikely to interfere with the judge's assessment, the Judge did not apparently carry out an assessment of the factors, and gave no reasoned decision, before deciding to proceed in the Applicant's absence.

28. This unfairness was compounded, after the Applicant finally arrived, by the Judge not giving him a fair opportunity (a) to be told what had happened; and (b) to apply to the Judge to reopen the application for a restraining order. The Applicant was a litigant in person who presented with possible mental health issues. One of the problems of proceeding in the defendant's absence was that, when he did arrive (as was clearly envisaged as a real likelihood), he would not know what evidence had been given against him. His ability, therefore, to respond to that evidence or make submissions to the Court on it was significantly impaired. The Judge dealt with the issue of potentially reopening the case in little more than three lines of the transcript. He did not explain to the Applicant that he could apply to the Court to reopen the case, or give him a fair opportunity to do so. The Judge summarily refused to reopen the case and did not give reasons for the refusal. As a result, a restraining order was imposed upon the Applicant after a hearing that was procedurally unfair.

29. The nature of the procedural unfairness meant that the Applicant had not had an opportunity (a) to cross-examine the witnesses called in support of the application for a restraining order; (b) to advance evidence in his own defence (including giving evidence himself and being cross-examined); or (c) to make submissions on whether

the evidence demonstrated that a restraining order was necessary, and upon the terms and duration of any order. In short, the Applicant did not receive a fair trial.

30. It does not inevitably follow that an order will be set aside on the ground of unfairness arising from errors in the conduct of the trial; it is a matter of degree: ***Bernard -v- The State of Trinidad and Tobago*** **[2007] 2 Cr App R 22** [27]. Ordinarily, however, the consequence of a determination that a litigant has not had a fair trial is that the decision challenged is set aside: ***Serafin -v- Malkiewicz*** **[2020] 1 WLR 2455** [49]:

> "What order should flow from a conclusion that a trial was unfair? In logic the order has to be for a complete retrial. As Denning LJ said in ***Jones -v- National Coal Board*** **[1957] 2 QB 55**… 'No cause is lost until the judge has found it so; and he cannot find it without a fair trial, nor can we affirm it'. Lord Reed PSC observed during the hearing that a judgment which results from an unfair trial is written in water. An appellate court cannot seize even on parts of it and erect legal conclusions upon them."

31. Having reached the conclusion that the proceedings against the Applicant were procedurally unfair and that the restraining order should be set aside, our provisional view was that the case should be remitted for the application to be reheard. The matter, however, was potentially complicated by the nature of appeal route against the imposition of a restraining order under s.5A.

32. s.5A Protection from Harassment Act 1997 provides:

> **Restraining orders on acquittal**
>
> (1) A court before which a person ("the defendant") is acquitted of an offence may, if it considers it necessary to do so to protect a person from harassment by the defendant, make an order prohibiting the defendant from doing anything described in the order.
>
> (2) The order may have effect for a specified period or until further order.
>
> (2A) In proceedings under this section both the prosecution and the defence may lead, as further evidence, any evidence that would be admissible in proceedings for an injunction under section 3.
>
> (2B) The prosecutor, the defendant or any other person mentioned in the order may apply to the court that made the order for it to be varied or discharged by a further order.
>
> (2C) Any person mentioned in the order is entitled to be heard on the hearing of an application under subsection (2B).
>
> (2D) It is an offence for the defendant, without reasonable excuse, to do anything that the defendant is prohibited from doing by an order under this section.
>
> (2E) A person guilty of an offence under this section is liable—
>
> (a) on conviction on indictment, to imprisonment for a term not exceeding five years, or a fine, or both, or

(b) on summary conviction, to imprisonment for a term not exceeding six months, or a fine, or both.

(2F) A court dealing with a person for an offence under this section may vary or discharge the order in question by a further order.

(3) Where the Court of Appeal allow an appeal against conviction they may remit the case to the Crown Court to consider whether to proceed under this section.

(4) Where—

(a) the Crown Court allows an appeal against conviction, or

(b) a case is remitted to the Crown Court under subsection (3),

the reference in subsection (1) to a court before which a person is acquitted of an offence is to be read as referring to that court.

(5) A person made subject to an order under this section has the same right of appeal against the order as if—

(a) he had been convicted of the offence in question before the court which made the order, and

(b) the order had been made under section 5.

33. A restraining order on acquittal is a civil order (albeit a breach of which is a criminal offence under s.5A(2D)) and the standard of proof is the balance of probabilities: ***R -v- Baldwin*** **[2021] EWCA Crim 703** [34]. However, s.5A(5) provides that, for the purposes of an appeal, the imposition of a restraining order on acquittal is treated as being a "sentence" following conviction. We note that restraining orders imposed under s.5A are not included in the new Sentencing Code: see ss.359-364 Sentencing Act 2020.

34. Appeals against sentence are governed by ss.9-11 Criminal Appeals Act 1968. s.11 provides, so far as material:

**Supplementary provisions as to appeal against sentence.**

(1) Subject to subsection (1A) below, an appeal against sentence, whether under section 9 or under section 10 of this Act, lies only with the leave of the Court of Appeal.

…

(3) On an appeal against sentence the Court of Appeal, if they consider that the appellant should be sentenced differently for an offence for which he was dealt with by the court below may—

(a) quash any sentence or order which is the subject of the appeal; and

(b) in place of it pass such sentence or make such order as they think appropriate for the case and as the court below had power to pass or make when dealing with him for the offence;

> but the Court shall so exercise their powers under this subsection that, taking the case as a whole, the appellant is not more severely dealt with on appeal than he was dealt with by the court below."

35. s.11(3) limits the orders that the Court of Appeal can make on a "sentence" appeal against a restraining order on acquittal to either quashing the original order, or imposing a fresh restraining order (providing its terms are not more onerous that the terms of the original order). Remitting the application for the restraining order to be reconsidered by the first instance Court is not expressly included as an option.

36. This point has caused us to consider what steps might properly be taken. We are satisfied that the absence of an express power to remit in s.11(3) does not stand as any impediment, if we were to quash the original restraining order made in this case, to the prosecution making a further application under s.5A.

37. We have reached this conclusion for the following reasons. The fact that s.5A(5) *treats* the imposition of a restraining order under the section as the imposition of a "sentence" for the purposes of an appeal does not alter the fact that proceedings under s.5A are civil in nature. If a restraining order under s.5A is quashed by the Court of Appeal, that represents no bar to the prosecution making a fresh application to the Crown Court under s.5A. There is no need for the Court of Appeal formally to remit the case. It is for the prosecution in any case to decide whether to apply for a restraining order under s.5A. When a sentence after conviction is quashed by the Court of Appeal, it is necessary for that Court to impose a lawful sentence in its place. Here, if the Court of Appeal quashes the restraining order under s.5A, there is no requirement to impose another "sentence" in its place. Indeed, where the Court has found that the original proceedings were procedurally unfair, it is likely that the Court will lack a proper evidential basis upon which to do so (for the reasons explained in the passage from ***Serafin*** quoted above). After the restraining order in this case is quashed, the Isleworth Crown Court remains the "court" before which the Applicant was acquitted of the offences with which he was originally charged. It therefore retains jurisdiction to consider an application under s.5A afresh once the original order has been quashed by the Court of Appeal.

38. We have reached this conclusion simply on the proper interpretation of s.5A. Had it been necessary to do so, we would have been satisfied that the duty to interpret legislation compatibly with the Human Rights Act 1998 would have required such an interpretation, so as to protect the Article 6 rights of both the Applicant and the complainant. Where the Court has determined that a trial process has been unfair and the resulting order must be set aside, the ordinary course is that the proceedings can be heard *de novo*. We are satisfied that there is nothing in s.11 and s.5A which prevents the Crown Court from hearing and determining a fresh application by the prosecution for a restraining order under s.5A following our decision to quash the original order imposed on 18 September 2020.

39. For the reasons explained above, we formally grant the Applicant permission to appeal, and we quash the restraining order imposed on him on 18 September 2020. It will be for the prosecution to decide whether to make a fresh application for a restraining order under s.5A. We direct, however, that if it decides to make a fresh application, it must give notice to the Applicant and the Crown Court within 28 days. In light of the history of this matter, we consider that it should be given a priority in terms of listing and

should be listed for an early directions hearing. Finally, we would invite the Applicant to consider carefully whether he should continue to represent himself at any renewed application for a restraining order. His interests, and the wider interests of justice, are likely to be better served by his being represented by a professional advocate.